

SCANNED

United States District Court
District of Massachusetts
Western Division

TRIF Company
Plaintiff

V.

Chris Morris d/b/a International Housewares,
Frank Stoegarar d/b/a Worldwide Marketing,
Zia Biao Xu and Zhi Xiong d/b/a Earth Link
LLC

C.A. No. -04-

30194-MAP

DOCKETED

**Memorandum of Law in Support of TRIF Company's Emergency Motion for Restraining Order
and Permanent and Preliminary Injunction**

Now comes the Plaintiff TRIF Company to move for a Restraining Order and Preliminary and Permanent Injunction to Enjoin the trade practices of the Defendants at the Big Exposition in Springfield, Massachusetts. This Exposition ends on October 3, 2004 when the Defendants will market their infringing products at another location in another state.

Background

For the past fifteen years David Harmon, President of TRIF Company, has been fully engaged in specialty retail selling at temporary locations. The specialty retail industry involves the development and marketing of specialty items at venues such as state fairs like the Big Exposition in Springfield, Massachusetts. See Harmon Affidavit para. 1-2.

03

1 Approximately one year ago Mr. Harmon incorporated TRIF Company, a Texas corporation with offices
2 in Rhode Island, to promote a line of therapeutic pillows. TRIF Company conducted extensive research
3 into these pillows including analysis by medical professionals. See Harmon Affidavit para. 3-4.

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5
6 TRIF Company developed manufacturing specifications for the pillows which include water resistant
7 covering material of a nylon/spandex blend that is machine washable and dryable, premium medical
8 grade micro-beads from Holland, tape reinforced seams, double locked stitched seams and double sewn
9 closures, and hypo-allergenic and FDA approved materials. See Harmon Affidavit para. 5 TRIF Company
10 invested hundreds of thousands of dollars in the development, advertising, manufacturing, importing and
11 distribution of this product line over the past year. See Harmon Affidavit para 6.

12
13 TRIF Company had special packaging designed for the pillows by Don Wolley of Cranston, Rhode
14 Island, who created a largely transparent bag for the pillows with distinctive lettering and logos. See
15 Harmon Affidavit para. 7.

16 One version of the bag includes the slogans "SNOOZTIME on the Beach" and "The Next Best Thing!"
17 Another version of the bag designed by Wolley for TRIF Corporation says "SNOOZTIME" and "A
18 Relaxing Experience". The pillows are marketed under the trademark name SNOOZTIME. Harmon
19 Affidavit para 8-11.

20
21
22 The SNOOZTIME pillows are sold in ten to twelve colors including some fluorescent colors and
23 wholesale at a price of \$6.50 to \$8.00 each. The pillows are sold in state fairs across the country including
24 the current Big Exposition in Springfield, Massachusetts, which runs from September 17 to October 3,
25 2004. The SNOOZTIME therapeutic pillows were introduced to the market on July 4, 2004 at the Delmar
26 California Fair at significant expense. See Harmon Affidavit para 10-12.

1 TRIF Company sells the product to individuals on a retail basis as well as bulk purchase customers who
2 typically operate specialty mall kiosks. TRIF Company also markets the pillows to department stores and
3 chain stores. See Harmon Affidavit para. 13-14.
4

5
6 Earlier this year, Frank Stoegarar of Worldwide Marketing, tried to buy TRIF Company's inventory of
7 therapeutic pillows for his specialty retail firm, but TRIF Company refused to sell. At or near the time of
8 the debut of SNOOZTIMEs therapeutic pillow line, Frank Stoegarar and/or Zia Biao Xu acquired one or
9 more SNOOZTIME pillows. At the Big Exposition in Springfield, Massachusetts on September 21 of
10 this year, TRIF Company learned that Frank Stoegarar in conjunction with Zia Biao Xu and Chris Morris
11 of International Housewares were selling a copy of the SNOOZTIME therapeutic pillow at a price of
12 \$3.40 to \$5.50 each. See Harmon Affidavit para. 15-16.
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14

15 TRIF Company acquired one of Morris' pillows and immediately detected a strong odor of petroleum, a
16 lighter covering material that easily runs and pulls, industrial grade beads from China with a distinctive
17 odor, fewer large beads with irregular surfaces than the SNOOZTIME product, no seam reinforcement,
18 inferior seam stitching, a counterfeit label and most importantly and offensively virtually identical
19 packaging. See Harmon Affidavit para. 17-19.
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22 The Morris package reads "ZZZ's Time on the Couch" and "The Next Best Stuff" in a largely
23 transparent bag with identical markings and lettering as the SNOOZTIME bag. The drawstring, artwork,
24 coloring, and logo style are identical. The introduction of this product line at the Big Exposition, where
25 TRIF Company has invested a significant sum to market its therapeutic SNOOZTIME pillows, has
26 confused SNOOZTIME customers. During the first two days of the Big Exposition, 75% of TRIF
27 Company's sales were SNOOZTIME therapeutic pillows. That figure decreased to 40% of sales as of
28 September 22, after Morris began selling the copycat pillows in packaging virtually identical to
29 SNOOZTIME packaging. Additionally, TRIF Company learned that Morris and his associates have
30

1 criticized the SNOOZTIME pillow line, alleging erroneously that the products are not washable. See
2 Harmon Affidavit para. 19-23.

3
4 Upon information and belief Morris and his associates are grossing more than \$1,200 a day selling their
5 infringing pillow products and that the Morris group has purchased 5,000 pillows for sale in this country.
6 TRIF Company has lost retail and bulk sales to the Morris group based on TRIF's reduced sales as well as
7 information TRIF Company has gathered from the field. TRIF Company's projected gross sales at the Big
8 Exposition was \$70,000-\$80,000 prior to the introduction of the knock off products by the Morris group.
9 See Harmon Affidavit para 24-26.
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12
13 Plaintiff has also invested in more than 42 freight containers from China, each containing approximately
14 7,000 pillows, as well as an additional 45 containers either in production or in transit. TRIF Company's
15 rental costs for the Big Exposition is approximately \$4,000 not including transportation, advertising, labor
16 and marketing materials such as posters. In addition to stealing customers from TRIF Company, the
17 Morris group has harmed the reputation of SNOOZTIME and TRIF Company for quality, has diluted the
18 SNOOZTIME trademark by confusing SNOOZTIME therapeutic pillows with inferior knock -off
19 products, and has caused TRIF Company incalculable losses. See Harmon Affidavit para. 27-29.
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21

22 Legal Standards

23 1. Likelihood Of Prevailing On The Merits

24 Plaintiff alleges that the Defendants' knowingly and willfully infringed on their trade dress, interfered
25 with prospective contractual relations, committed unfair trade practices under the Lanham Act;
26 violated Massachusetts Chapter 93A and are guilty of false designation of origin and false labeling.
27 The Plaintiff is likely to succeed on each and every count of this claim. In particular, Plaintiff's claim
28 for trade dress infringements is compelling.
29
30

1
2 Section 43(A) of the Lanham Act, provides for protection against the use of “ any word, term, name,
3 symbol or device” that “ is likely to cause confusion, or to cause mistake or to deceive” as to the source or
4 origin of a product. Accordingly, Defendants’ unauthorized use of packaging, virtually identical to
5 Plaintiff’s, is clearly actionable. 15 U.S.C. Section 1125(a) of the Lanham Act extends protection to
6 words and symbols, but also to “trade dress,” defined as “ the design and appearance of a product together
7 with the elements making up the overall image that serves to identify the product presented to the
8 consumer.” Chrysler Corp. v. Silva, 118 F.3d, 56, 58 (1st Cir. 1995). The primary purpose of trade dress
9 protection is to protect that which identifies a product source. IP Lund Trading ApS vs. Kohler Co. 163
10 F.3d 27, 35 (1st Cir. 1998) “Courts recognize trade dress claims based on both product packaging and on
11 product design/configuration.” Wal-Mart Stores vs. Sumera Brothers., Inc., 529 U.S. 205, 213-14 (2000) ;
12 see also Yankee Candle Co. v. The Bridgewater Candle Co., 259 F.3d 25 (1st Cir. 2001).

13
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15
16 In order for trade dress to be protected under section 43(A) of the Lanham Act, a Plaintiff must prove that
17 the trade dress is (a) used in commerce (b) non-functional and (c) distinctive. 163 F.3d 36. Distinctiveness
18 may be either “inherent” i.e., the “intrinsic nature of the trade dress serves to identify a particular source,”
19 Wal-Mart, 529 U.S. 210 or “acquired” i.e., the trade dress has acquired a “secondary meaning whereby
20 the public views its primary significance as identifying the source of the product rather than the product
21 itself,” Id. 211. Finally, to prove infringement of protected trade dress the Plaintiff must show that
22 another’s use of a similar trade dress is likely to cause confusion among consumers as to the products
23 source. Lund, 163 F.3d at 43-44.

24
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26
27 As discussed above, the Plaintiff’s packaging has clearly been used in commerce since the products first
28 sale on July 4th, 2004, at the Delmar Fair in California. The bag is not a necessary or functional element of
29 the therapeutic pillow but rather is decorative and eye-catching packaging for the product. It is
30 inherently tailored to market the product as SNOOZETIME’s that it is patently distinctive. The shape,

1 drawstring, logo, lettering, color, wording and artwork on the pillow bags are distinctive and serve to
2 identify Plaintiff as the source of the product. Plaintiff's packaging was designed to distinguish it from
3 others in the trade. The Defendants' willful copying of the Plaintiff's packaging design has confused
4 consumers as to the source, which can easily (but erroneously) be mistaken as SNOOZTIME pillows.
5

6 7 **2. Irreparable Harm**

8 The Plaintiff's reputation for quality, fair pricing, and distinctive packaging is being damaged further
9 every day the Defendants are allowed to sell their products in packaging which is confusingly similar to
10 Plaintiff's. There is no adequate remedy at law to protect the Plaintiff's interests and its reputation among
11 its retail and bulk customers. Moreover, its lost sales and profits are virtually incalculable under these
12 circumstances. For these reasons, the Plaintiff can only be protected from irreparable damage to its
13 reputation, product line and business plan through equitable remedies that restrain the Defendants from
14 infringing and enjoin them from further unfair trade practices.
15

16 17 **3. Balance of the Equities**

18 The Plaintiff's investment in this product line and packaging has been substantial while the Defendants
19 have merely copied the Plaintiff's design without any of the associated start-up efforts and costs. It is
20 grossly unfair for a competitor to capitalize on another's investment by appropriating its intellectual
21 property. The Plaintiff accepts fair competition, such as the other non-infringing products being sold by
22 the Defendants at the Big Exposition. The copied packaging, however, constitutes unbalanced and unfair
23 trade that warrants immediate relief. See Hypertherm Inc. vs. Precision Products, Inc. 832 F.2d 697,700
24 (1st Cir. 1987).
25

26 27 28 **4. Public Interest**

29 The public has a compelling interest in protecting fair trade and intellectual property rights. The
30 Plaintiff's distinctive and specially designed packaging is such a protected intellectual property.

CONCLUSION

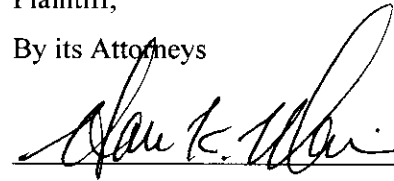
For the foregoing reasons Plaintiff respectfully requests that the Court issue an immediate restraining order and injunction that orders the following:

- A. Defendant Cease and Desist from making, selling and distributing confusingly similar pillow and pillow packaging;
- B. Have all Defendants' confusingly similar pillows and pillow packaging immediately seized from the Big Exposition in Springfield Massachusetts;
- C. Notify all people that purchased these items ordering an immediate recall at Defendants' expense;
- D. Deliver to Plaintiff all of Defendants' infringing packaging for destruction;
- E. Pay Plaintiff compensation in the amount of \$ 500, 000 or an amount which the court deems just;
- F. Pay Plaintiff a total of \$1,000,000 or an amount the Court deems just for punitive damages;
- G. Pay Plaintiff's attorneys' fees and costs.
- H. Declare that Defendants' pillows are mislabeled and out of compliance with applicable legal requirements.

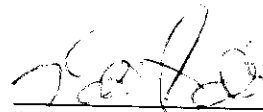
Respectfully submitted by,

Plaintiff,

By its Attorneys



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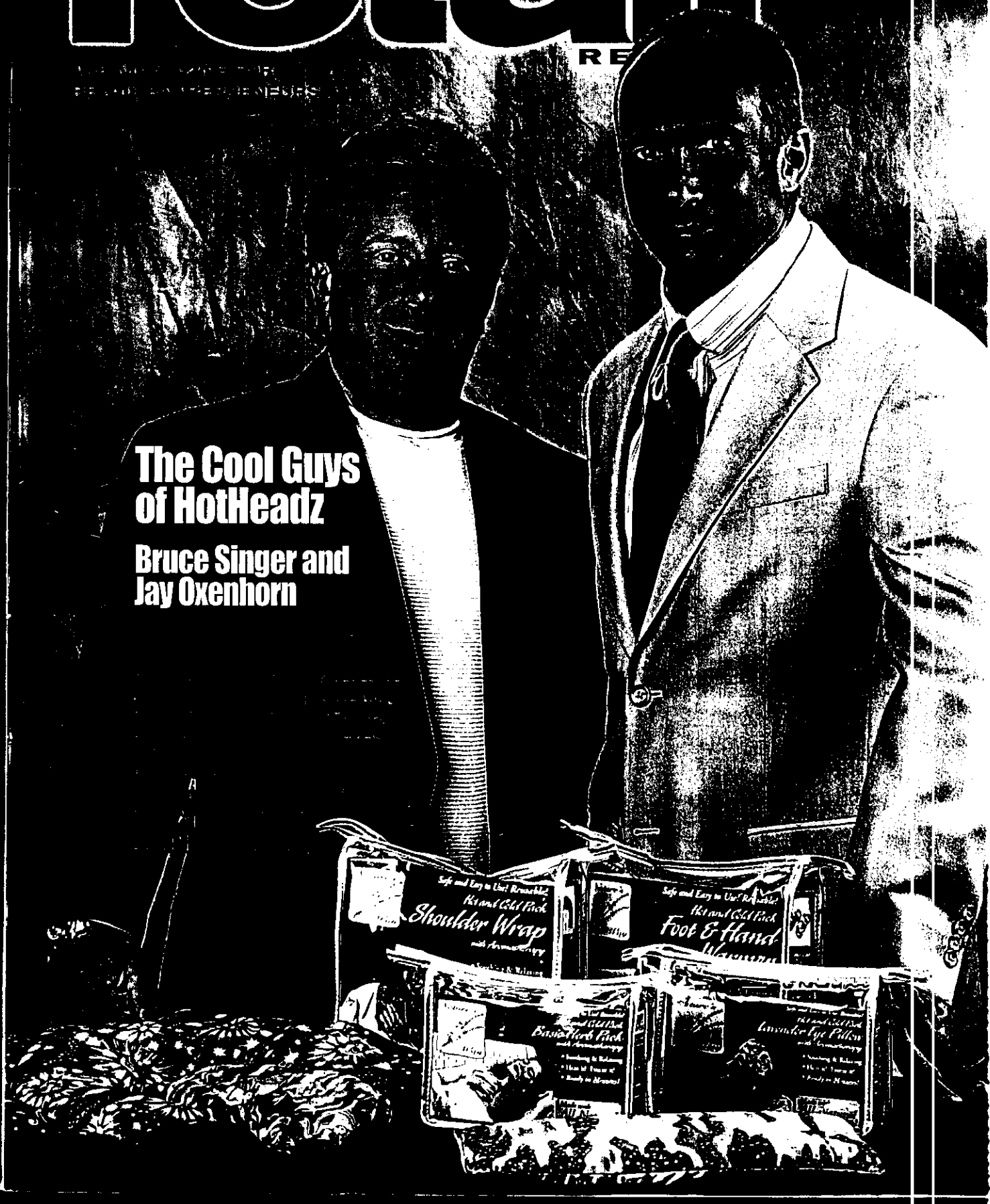
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specialty retail

THE COOL GUYS OF HOTHEADZ
BY JAY OXENHORN

The Cool Guys of HotHeadz

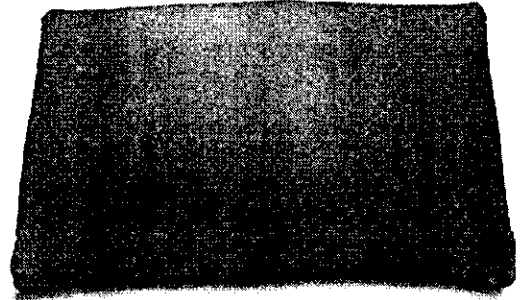
Bruce Singer and
Jay Oxenhorn



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"The new DREAMER™ PILLOW has many distinct advantages over regular foam pillows." — Dr. James Baggio, D.C.

1. First of all, they are very comfortable!
2. If you are a side sleeper, the pillow will mold to your shoulder height allowing you to keep your neck in line with your spine vs. being bent or crooked.
3. If you are a back sleeper, the pillow nicely fills the gap between your neck and the bed and keeps the proper curvature in your neck (arched slightly forward, towards your throat).
4. Many of the cervical pillows on the market will lose their support and need to be replaced, often within a years time. Snooztime™ pillows should maintain their supportive qualities indefinitely, due to the flexible qualities of the filling.
5. The entire pillow can easily be machine washed, as opposed to just the pillow case.
6. People who are unable to enjoy the supportive qualities of a down pillow due to allergies can now enjoy the same supportive qualities of down in a Snooztime pillow without the discomfort of allergies.
7. They feel really cool and comfortable!!!



James Baggio D.C.

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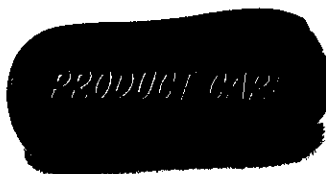
Squishy

Squiggly

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Your Snooztime pillow will provide years of comfort with only minimal maintenance and cleaning. The pillow shell is a blend of super stretch Nylon and Spandex, and the filling is 100% polystyrene foam beads.

Washing Instructions:

The Snooztime pillow can be hand washed in warm water using a mild detergent and then air dried. Using an oxygen bleach or enzyme pre-wash can help remove stubborn stains.
DO NOT USE CHLORINE BLEACH.

The Snooztime pillow can also be machine washed on a Gentle cycle using warm water, mild detergent and oxygen bleach, and then dried in the dryer using the Fluff setting.
DO NOT USE CHLORINE BLEACH.



Please Print:

Name: _____

Address: _____

Email: _____

Where Purchased: _____

Date Purchased: _____

Warranty

Snooztime™ warrants to the original purchaser that our pillows will be free from defects in materials and workmanship for a period of 90 days from the date of the original sales receipt. If during the warranty period our pillows are found to have defects in materials or workmanship they will be replaced without charge. Except as set forth above, Snooztime makes no other warranties, either express or implied, including the implied warranties of merchantability or fitness for a particular purpose. In no event will Snooztime, its employees or officers, or employees and officers of the parent corporation be liable for incidental or consequential damages of any kind, whether such damages are claimed on account of breach or warranty, breach of contract, or strict product liability, including without limitations, damage to property or other economic losses. This limited warranty gives you specific legal rights and you may also have other rights, which vary from state to state.



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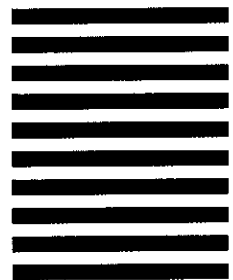
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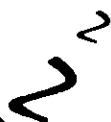
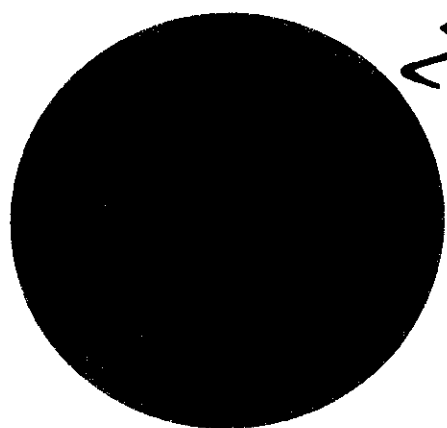


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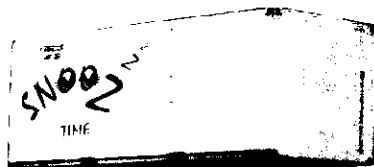
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**PLAN #1 BUY A 20 FT. CONTAINER**

PILLOW STYLE	QTY PER CONT.	PRICE EA.	YOUR COST	SELL PRICE	TTL SALES	PROFIT
ORIGINAL SNOOZ	1500	\$5.20	\$7800.00	\$19.95	\$29925.00	\$22125.00
U- SNOOZ NECK	350	5.50	1925.00	29.95	10482.50	8557.50
ANYWHERE SNOOZ	350	6.60	2310.00	34.95	12232.50	9922.50
SNOOZ DREAMER	150	9.10	1365.00	49.95	7492.50	6127.50
LUMBAR SNOOZ	150	7.60	1140.00	29.95	4492.50	3352.50
BODY SNOOZ	150	9.10	1365.00	44.95	6742.50	5377.50
TOTALS:	2650		\$15,905.00		\$71,367.50	\$55,462.50

TERMS: See all Terms below.

PLAN #2 BUY A 40 FT. CONTAINER

PILLOW STYLE	QTY PER CONT.	PRICE EA.	YOUR COST	SELL PRICE	TTL SALES	PROFIT
ORIGINAL SNOOZ	3500	\$5.20	\$18,200.00	\$19.95	\$69825.00	\$51625.00
U- SNOOZ NECK	800	5.50	4400.00	29.95	23960.00	19560.00
ANYWHERE SNOOZ	800	6.60	5280.00	34.95	27960.00	22680.00
SNOOZ DREAMER	300	9.10	2730.00	49.95	14985.00	12255.00
LUMBAR SNOOZ	300	7.60	2280.00	29.95	8985.00	6705.00
BODY SNOOZ	300	9.10	2730.00	44.95	13485.00	10755.00
TOTALS:	6000		\$35,620.00		\$159,200.00	\$123,580.00

TERMS: See all Terms below.

PLAN #3 ORDER W/ DEFERRED SHIPPING

SAME PLAN AS ABOVE EXCEPT YOU ARE PLACING YOUR ORDER NOW FOR GUARANTEED NOVEMBER DELIVERY, JUST IN TIME FOR HOLIDAY SELLING! THE ONLY DIFFERENCE IN COST TO YOU IS .75 CENTS PER UNIT INCREASE. THE SURCHARGE IS REQUIRED BECAUSE WE CARRY THE BALANCE UNTIL YOUR ORDER SHIPS. THIS PLAN WILL GIVE YOU THE SECURITY OF KNOWING YOU WILL HAVE AMPLE PRODUCT DURING THE PEAK HOLIDAY BUYING PERIOD, WITHOUT SCRAMBLING FOR PRODUCT AT THE LAST MINUTE. THE MOST VERSATILE PLAN!

THIS PLAN IS ONLY AVAILABLE UNTIL SEPTEMBER 15, 2004.

AFTER THAT, WE CANNOT GUARANTEE HOLIDAY DELIVERY!!!

PLAN #4 BUY DIRECT FROM OUR WAREHOUSE

PILLOW STYLE	QTY PER CASE	PRICE EA.	SELL PRICE
ORIGINAL SNOOZ		\$8.00	\$19.95
U- SNOOZ NECK		9.50	29.95
ANYWHERE SNOOZ		10.50	34.95
SNOOZ DREAMER		16.50	49.95
LUMBAR SNOOZ		9.50	29.95
BODY SNOOZ		15.50	44.95

Orders from this plan are shipped directly from our warehouses in Texas, Rhode Island, Los Angeles, Seattle, Toronto, or Vancouver. Please call for details.

TERMS

1. All goods F.O.B. China
2. 50% deposit upon order placement
3. Product usually ships 2-3 weeks from order placement.
4. Balance to be paid when container leaves China.
5. We can provide a Broker for buyer if needed
6. Buyer is responsible for Customs, Insurance, & Freight Charges.
7. Container will be delivered to your specified location.
8. Loss of deposit if balance is not paid when required.
9. TRIF Corp. not responsible for delays for any reason.



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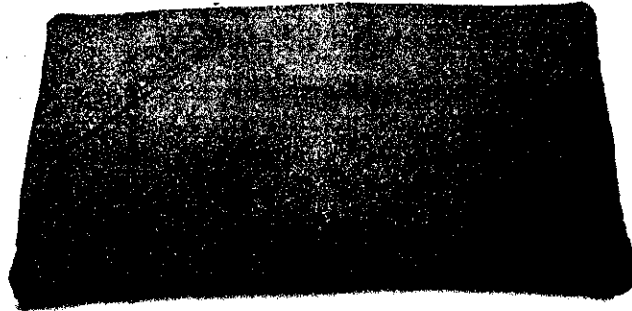
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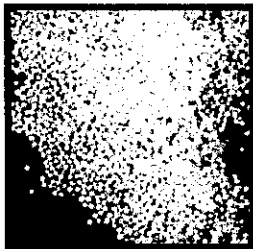
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is a luxurious full-size bed pillow with the incredible comfort, support and easy care of our Snooztime™ personal and travel pillows. The fill of the Dreamer™ is made exclusively of ultra slippery "microbeads", providing uniform support to your head and neck throughout the night.



Unlike expensive "memory foam", our microbead fill moves when you move, continuously changing to meet your support needs. There are no zippers or hardware of any kind and the durable stretch cover won't bunch up or fold over, so no more "pillow marks" or "bed face" in the morning! Made of durable Cotton, Polyester and Microbeads, the Dreamer™ is naturally hypoallergenic and resists the growth of mold, mildew and bacteria. And the Dreamer™ is completely washable*.



Polystyrene microbead filling

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Check out these great features:

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- Uniform support
- 27" x 15" x 4"
- Hypoallergenic
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- Just 24.69 ounces

*see product care tag

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